APPENDIX

APPENDICES

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1973 — APRIL SESSION, 1974

No. 74-1182

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PAUL BROWN, COMETAS DILANJIAN, THOMAS SHERIDAN, ELLEN SUE STEWART and SANDRA STEWART,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 CR 630
THOMAS J. MCMILLEN, *Judge.*

ARGUED JUNE 6, 1974—DECIDED JULY 3, 1974

Before CLARK, *Associate Justice,** SPRECHER, *Circuit Judge,* and BEAMER, *District Judge.***

* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

** District Judge George N. Beamer of the Northern District of Indiana is sitting by designation.

SPRECHER, *Circuit Judge.* This appeal pivots upon the validity of a warrantless "border search" made at Chicago which resulted in the discovery of a large quantity of cocaine.

I

Seven defendants, including three men (Paul Brown, Cometas Dilanjian and Thomas Sheridan) and two sets of sisters (Mary Ann and Susan Prader, and Ellen Sue and Sandra Stewart) were indicted in Count I for conspiracy in violation of 21 U.S.C. § 963 to import cocaine into the United States in violation of 21 U.S.C. § 952(a) and to distribute cocaine outside the United States knowing that it would be imported in violation of 21 U.S.C. § 959. In addition, the Prader sisters were indicted in Count II of importing 1,917.3 grams of cocaine in violation of section 952(a) and the Stewart sisters were indicted in Count III of distributing the same quantity knowing it would be imported, in violation of section 959.

The indictment alleged and all the defendants admitted at the time of pleading guilty to all counts that in March, 1973, the men and the Prader sisters discussed at Chicago, Illinois, the importation of cocaine; that on April 2, 1973, the Praders traveled by airplane from Chicago to Acapulco, Mexico; that on April 5, the Stewarts traveled from Peru, South America, where they received the cocaine, to Acapulco, where they delivered it to the Praders a few days later; and that on April 8, the Praders traveled by airplane from Acapulco to Chicago, carrying the 1,917.3 grams on their persons.

Mary Ann Prader had passed through Customs inspection at O'Hare International Airport on April 8 and was waiting a short distance from the inspection area for her sister. As Susan Prader was going through the Customs line, Customs Patrol Officer Goodson observed that her dress or skirt "fitted rather tightly at the waistline and then sort of flared out to a length to perhaps to her ankles" resulting in a bulge in the area of her stomach. He became suspicious because the clothing did not appear normal on her slender frame. Goodson then escorted Susan to a private search room and sought the assistance of Sharon Holihan and Violet Anderson, two female employees of the Customs Service.

According to Mrs. Holihan's testimony at the suppression hearing, "we were told by . . . Goodson that he was suspicious of Susan Prader because of her long clothing and mostly because she appeared to have a bulge on her abdomen below her waist." When the three women were alone, the Customs inspectors advised Susan that they were concerned with the bulge in the area of her waist or midriff, whereupon she voluntarily unzipped her skirt, pushed it four to six inches below her waist to expose her abdomen, then held the skirt at that point for a few seconds and brought it back up.

Because this movement was done without any instructions from the Customs inspectors and because Susan "pushed the skirt down and then stopped . . . and brought it back up," Mrs. Holihan "became suspicious that perhaps she had something underneath her skirt further down on her legs." Without removing any clothing, Mrs. Holihan lifted Susan's skirt up from the bottom to above her knees where she discovered packages bandaged or taped to her legs. One of the inspectors then left the

private room and advised Goodson of their discovery. After the contents of the packages were field tested and found positive, Goodson identified himself to Mary Ann and took her back to the inspection room, where similar packages were found taped to her legs.

An evidentiary hearing was held on December 19, 1973 upon the motions of Susan and Mary Prader to suppress the items seized from their persons at O'Hare Airport on April 8. On December 27, the court denied the motions in a written opinion in which it relied in part upon *United States* v. *Robinson*, 414 U.S. 218 (1973).

On January 16, 1974 the three male defendants and the Prader sisters pleaded guilty and on the following day the Stewarts also pleaded guilty. In accepting the Praders' pleas, the district judge said that "I think you could preserve your right to appeal on . . . [the motion to suppress] even if you plead guilty, subject to that condition."

The government did not acquiesce in the "condition" purporting to preserve the right to appeal the suppression question. In fact the prosecutor pointed out that if pleading guilty did not result in the waiver of the right to appeal "every defendant that comes into the building . . . [for] sentencing to see what they get, and if they don't like what they get . . . then they take it up on appeal."

The three male defendants were each sentenced to three years' imprisonment, Susan Prader and Sandra Stewart each to one year, and Mary Ann Prader and Ellen Sue Stewart each to six months' imprisonment.

All seven defendants appealed. The Praders argued that their motions to suppress should have been granted. The other defendants argued the voluntariness of their guilty pleas and their standing to seek suppression of the evidence found on the persons of the Praders.

The government argued that the Praders waived the suppression question by pleading guilty, that the other defendants had no standing to raise it, that in any event the suppression motions were properly denied, and that the guilty pleas were voluntary and in full compliance with FED. R. CRIM. P. 11.

II

The facts of this case in relation to the suppression question are quite similar to those in *United States* v. *Cox*, 464 F.2d 937, 944 (6th Cir. 1972), where the Sixth Circuit observed that "the district court allowed defendants the best of two worlds" in that "[t]hey were allowed to plead guilty to reduced charges, while reserving their right to appeal as if they had maintained innocence through trial." The court concluded that the procedure of allowing an appeal on nonjurisdictional grounds following intelligent and voluntary pleas of guilty violated public and judicial policy and "will not be countenanced in the future in this Circuit." 464 F.2d at 945. Nevertheless the court decided in that case to honor the agreement entered into between the defendants and the prosecutor and accepted by the district court, as being required by the plea bargaining process. In the present case the prosecutor did not consent to the availability of the right of appeal as part of any plea bargaining.

The rationale of *Cox* appears to find support in *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), where the Supreme Court said:

> We thus reaffirm the principle recognized in the *Brady* trilogy:[1] a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice be received from counsel was not within the standards set forth in *McMann*. (Footnote supplied.)

However, as the *Cox* court, we hesitate to refuse to consider the merits of the suppression question inasmuch as the district court held out some reason for the defendants to believe that they were pleading guilty "subject to that condition," albeit lacking the consent of the prosecutor to that condition. *Cf. Santobello* v. *New York*, 404 U.S. 257, 262 (1971). We proceed therefore to a consideration of the propriety of the district court's denial of the motions for suppression.

III

Although Chicago is more than 1200 miles from the Mexican border, the search of the Prader sisters at O'Hare

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[1] *Brady* v. *United States*, 397 U.S. 742, 750 (1970), *McMann* v. *Richardson*, 397 U.S. 759, 770 (1970), and *Parker* v. *North Carolina*, 397 U.S. 790 (1970).

International Airport upon their arrival on a nonstop flight from Acapulco constituted a border search.[2]

19 U.S.C. § 482 provides in part as follows:

> Any of the officers or persons authorized to board or search vessels may stop, search and examine . . . any . . . person, on . . . whom he or they shall suspect there is merchandise which . . . shall have been introduced into the United States in any manner contrary to law . . .; and if any such officer or other person so authorized shall find any merchandise on or about any such . . . person . . . which he shall have reasonable cause to believe to have been unlawfully introduced into the United States . . ., he shall seize and secure the same for trial.

"When a person or vehicle is detained at the border just after entering the Country, the agent's statutory authority to search is virtually unfettered except perhaps as to due process concerning the manner, not the cause, of the search. . . . Presumably, they are limited only by common standards of decency and propriety." *United States* v. *Storm*, 480 F.2d 701, 704 (5th Cir. 1973). "Border searches, absent search warrants or probable cause, have been uniformly upheld by the courts as long as the customs agents have had a reasonable suspicion of violations of the customs laws." *United States* v. *Thompson*, 475 F.2d 1359, 1362 (5th Cir. 1973).

What is required to be balanced in any particular case is the level of suspicion of the agent against the level of indignity perpetrated upon the traveler. "Mere suspicion" does not justify a search within body cavities,

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[2] ". . . [A] search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search." *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 273 (1973).

Henderson v. *United States,* 390 F.2d 805, 808 (9th Cir. 1967), nor the administration of emetics, *United States* v. *Guadalupe-Garza,* 421 F.2d 876, 879 (9th Cir. 1970). Although both of those cases obviously involved a greater indignity than simply a strip search, *Henderson* suggested that strip searches should require a "real suspicion," 390 F.2d at 808, and *Guadalupe-Garza* defined "real suspicion."

> "Real suspicion" justifying the initiation of a strip search is subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law.

421 F.2d at 879.

The indignity in the present case did not rise to a stripping or strip search. Susan Prader, in a private room in the presence of two other women, voluntarily pulled her skirt a few inches down from her waist and bared her midriff for a few seconds. Shortly thereafter one of the female inspectors lifted Susan's ankle-length skirt to a point just above her knees. She was not requested to nor did she strip, nor did the female inspectors strip her.

The suspicion developed first in the mind of the male Customs inspector who found an incongruity in a long, flared skirt with a waistline bulge on a slender girl.

In *United States* v. *Berard,* 281 F. Supp. 328 (D. Mass. 1968), suspicious bulges on the persons of two travelers were found to warrant the opening of their shirts, which revealed them both to be bound in tape from waist to armpits with plastic bags of heroin. In *United States* v.

Glaziou, 402 F.2d 8 (2d Cir. 1968), nervousness and a waistline bulge justified a touching and squeezing search which revealed heroin. In *Shorter* v. *United States,* 469 F.2d 61, 64 (9th Cir. 1972), heavy clothing in warm weather and a "bulge, or irregularity, in his shirt at the waist line" provided a sufficient basis for requiring the traveler to remove his overcoat and suit coat and to empty his pockets, whereupon he voluntarily lifted his shirt, revealing a waist girdle with plastic bags of heroin.

In *United States* v. *Price,* 472 F.2d 573 (9th Cir. 1973), a strip search had been conducted on the basis of a female traveler's nervousness during questioning and a suspicious bulge around her waist. Heroin and cocaine were eventually found concealed between her lower limbs. A majority of the court found the search to be excessive since early in the examination it became apparent that the suspicious bulge was simply body fat. In a dissenting opinion, Judge Kilkenny pointed out the distinction between a strip search and a body cavity search and concluded that the inspectors had a "real suspicion" sufficient to conduct the subsequent strip search.

In the present case there was no strip search. Susan Prader testified that none of her clothing had been removed. In addition, although Susan's voluntary baring of her midriff had indicated, as in *Price,* that the bulge at her waist was not contraband, that very act developed a new suspicion in the minds of the inspectors. As Mrs. Holihan testified, the quick, unrequested lowering of her skirt top a few inches but no lower, followed by the rapid pulling of the skirt back up, caused Mrs. Holihan to become suspicious "that perhaps she had something underneath her skirt further down on her legs." We conclude that the inspectors harbored "real suspicion." Both Goodson and Holihan were experienced Customs inspectors, Goodson

for thirteen years and Holihan for three years. The district judge who observed and heard the testimony concluded:

> The patrol officer had a reasonable suspicion concerning what might be on Susan's person, and this justified detaining her for a reasonable search of her person beyond the specified part which had aroused suspicion. . . . Furthermore the experienced searching agent acquired her own suspicion because of the defendant's actions during the initial search.
>
> The further search turned up the packages, and these in turn afforded the patrol officer with reasonable grounds to suspect sister Mary Ann who had been passed previously. . . . We see no reason why this subsequent suspicion need to occur only while the suspect was within the confines of the inspection area; Mary Ann was still inside the International Building, a mere fifteen feet outside the door of the inspection area, and she admittedly had no intention of leaving the building before her sister.

In *United States* v. *Glaziou,* 402 F.2d 8, 14-15 (2d Cir. 1968), two seamen had exited the pier gatehouse and were 200 feet up the street when the Customs officer noticed the waistline bulge around one of them. The court approved the search of both of them, concluding that "the officers were justified in searching Lemieux as soon as the contraband was uncovered on his companion." Here the material found on Susan was field tested and determined to be cocaine before Mary Ann was searched. The search of Mary Ann consisted also of only the lifting up of her skirt.

Upon the question of the possible indignity suffered by the sisters, the district judge found:

> Nor was this an offensive invasion of defendants' privacy. . . . The two searches which produced the results could have been performed by a thorough pat-down in public, particularly if defendants had not been wearing the long full skirts which in part caused the suspicion which led to the searches in the first place.

Actually the skirts of each girl were lifted in a completely private room in the presence only of the two female inspectors.

We conclude that the level of suspicion was high enough to justify the relatively dignified search to which both girls were subjected. The trial court correctly denied the motions to suppress the evidence obtained in the searches.

IV

Inasmuch as we find the searches and seizures relating to the Praders to have been justified, we need not consider the standing of the other defendants to challenge the evidence produced thereby. *Cf. Alderman* v. *United States,* 394 U.S. 165 (1969).

In regard to the interrogation of the defendants by the court before accepting their guilty pleas, we conclude that the court adequately addressed each defendant personally and determined that the plea was made voluntarily with understanding of the charge and the consequences of the plea as required by Rule 11 as it read at the time of the trial and as it now reads.[3]

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[3] On April 23, 1974, the Supreme Court approved and transmitted to Congress, to take effect on August 1, 1974 if approved, amendments to the Federal Rules of Criminal Procedure, including an amended Rule 11. *See Moody* v. *United States,* ..... F.2d ..... (7th Cir.), No. 73-1853, May 22, 1974.

Specifically, the Stewart sisters complained that they were not advised of the three-year special parole term, but prior to sentencing when they still had the opportunity to withdraw their guilty pleas, the court discussed the parole term in the presence of all defendants and their counsel.

In regard to defendant Sheridan, it was argued that it was not sufficiently determined whether his known use of methadone influenced his plea. The record shows that the court spent a relatively long period of time in the presence of all of the defendants at the acceptance of the pleas and again at sentencing and addressed all of them, including Sheridan, personally on several occasions. At sentencing, a representative of the Methadone Maintenance Institute was present and said:

> Mr. Sheridan is a patient at the Methadone Maintenance Institute. He has been very faithful in his attendance at the clinic. We have weekly therapy sessions. Mr. Sheridan has come to those sessions on a sort of regular basis. We feel that he is trying very hard to participate well in the program. We feel that his regular attendance is testimony to that fact.

Whereupon the following took place:

> THE COURT: Well, Mr. Sheridan's statement to the probation officer is, apparently, that he was not getting very much treatment from your organization and apparently wasn't benefitting very much from it. Is that correct?
>
> DEFENDANT SHERIDAN: No, sir. That was the Veterans Administration when I was under the program over there. I switched over to the Methadone Maintenance Institute which is much better, really.

THE COURT: When did you switch over?
DEFENDANT SHERIDAN: I started in August at the VA and I switched over in about September, I believe.
THE COURT: Of '73?
DEFENDANT SHERIDAN: Yes.

Inasmuch as Sheridan never contended that he was under the influence of drugs at the time of his plea, in view of his satisfactory treatment for about five months prior to his plea, and because of the court's close personal observation of him, we conclude that Sheridan's guilty plea, as that of the other defendants, was voluntary.

Convictions of all defendants are affirmed.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
July 25, 1974
Before
Hon. TOM C. CLARK, Associate Justice*
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. GEORGE N. BEAMER, Chief Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 74-1182 vs.
PAUL BROWN, et al., Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
73 CR 630

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote hereon, nor any judge having voted to grant the suggestion, and all of members of the panel (or majority) having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby DENIED.

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* Hon. Tom C. Clark of the Supreme Court is sitting by designation.

* Hon. George N. Beamer of the Northern District of Indiana is sitting by designation.

APPENDIX "B"

RULE 11. Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX "C"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

vs.

PAUL BROWN, COMETAS DILANJIAN, MARY ANN PRADER, SUSAN PRADER, THOMAS SHERIDAN, ELLEN SUE STEWART, and SANDRA STEWART

Judge McMillen

No. 73 CR 630 — Violation: Title 21, United States Code, Sections 952(a), 959, and 963

The JULY 1973 GRAND JURY charges:

1. From on or about March 1, 1973 to on or about April 30, 1973, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, the defendants,

PAUL BROWN ✓
COMETAS DILANJIAN ✓
MARY ANN PRADER,
SUSAN PRADER,
THOMAS SHERIDAN, ✓
ELLEN SUE STEWART, and
SANDRA STEWART,

unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other, to commit certain acts, that is: to knowingly and intentionally import a quantity of a substance containing cocaine, a Schedule II Narcotic Drug Controlled Substance, into the

United States from Acapulco, Mexico, in violation of Title 21, United States Code, Section 952(a); and, to knowingly and intentionally distribute a quantity of a substance containing cocaine, a Schedule II Narcotic Drug Controlled Substance, at Acapulco, Mexico, a place outside the territorial jurisdiction of the United States, knowing that said substance would be unlawfully imported into the United States, in violation of Title 21, United States Code, Section 959.

2. It was part of the conspiracy that defendants would obtain approximately 1,917.3 grams of a substance containing cocaine at a place outside the United States.

3. It was further a part of the conspiracy that defendants would unlawfully import approximately 1,917.3 grams of a substance containing cocaine into the United States.

4. It was further a part of the conspiracy that the defendants would misrepresent, conceal, hide and cause to be misrepresented, concealed and hidden, the purposes of and the acts done in furtherance of the conspiracy and to accomplish the purposes and objectives of the conspiracy, the defendants did perform, among others, the following overt acts:

a. In or about March of 1973, defendants PAUL BROWN, COMETAS DILANJIAN, and THOMAS SHERIDAN had a conversation with defendants MARY ANN and SUSAN PRADER, at Chicago, Illinois, concerning the unlawful importation of a quantity of cocaine.

b. In or about the end of March, 1973 or the beginning of April, 1973 COMETAS DILANJIAN and THOMAS SHERIDAN paid MARY ANN and SUSAN PRADER $1,000.00 each for the purpose of obtaining cocaine, a narcotic drug controlled substance.

c. On or about April 2, 1973, SUSAN and MARY ANN PRADER traveled by plane from Chicago, Illinois to Acapulco, Mexico.

d. On or about April 5, 1973, SANDRA and ELLEN STEWART traveled from Peru, South America to Acapulco, Mexico for the purpose of distributing cocaine, a narcotic drug controlled substance, to SUSAN and MARY ANN PRADER.

e. On or about April 7, 1973, SANDRA and ELLEN STEWART had a conversation with SUSAN and MARY ANN PRADER, at Acapulco, Mexico concerning the unlawful importation of cocaine, a narcotic drug controlled substance.

f. On or about April 7, 1973, SANDRA and ELLEN STEWART met with SUSAN and MARY ANN PRADER at Acapulco, Mexico for the purpose of distributing cocaine, a narcotic drug controlled substance.

g. On or about April 8, 1973, SUSAN and MARY ANN PRADER traveled from Acapulco, Mexico to Chicago, Illinois, in possession of approximately 1,917.3 grams of a substance containing cocaine, a narcotic drug controlled substance.

In violation of Title 21, United States Code, Section 963.

COUNT TWO

The JULY 1973 GRAND JURY further charges:

On or about April 8, 1973, at O'Hare International Airport, in the Northern District of Illinois, Eastern Division,

MARY ANN PRADER and

SUSAN PRADER,

defendants herein, knowingly and intentionally did import approximately 1,917.3 grams of a substance containing cocaine, a Schedule II Narcotic Drug Controlled Substance, into the United States from Acapulco, Mexico;

In violation of Title 21, United States Code, Section 952(a).

COUNT THREE

The JULY 1973 GRAND JURY further charges:

On or about April 7, 1973, at Acapulco, Mexico, a place outside the territorial jurisdiction of the United States,

ELLEN SUE STEWART and
SANDRA STEWART,

defendants herein, knowingly and intentionally did distribute approximately 1,917.3 grams of a substance containing cocaine, a Schedule II Narcotic Drug Controlled Substance, knowing that such substance would be unlawfully imported into the United States;

In violation of Title 21, United States Code, Section 959.

A TRUE BILL:

FOREMAN

UNITED STATES ATTORNEY
JBB:ekh

APPENDIX "D"

21 § 952 Importation of controlled substances — Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

• • •

21 § 959. Manufacture or distribution for purposes of unlawful importation

It shall be unlawful for any person to manufacture or distribute a controlled substance in schedule I or II—

(1) intending that such substance will be unlawfully imported into the United States; or

(2) knowing that such substance will be unlawfully imported into the United States.

This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States. Any person who violates this section shall be tried in the United States district court at the point of entry where such person enters the United States, or in the United States District Court for the District of Columbia.

Pub.L. 91-513, Title III, § 1009, Oct. 27, 1970, 84 Stat. 1289.

• • •

21 § 963 Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Pub.L. 91-513, Title III, § 1013, Oct. 27, 1970, 84 Stat. 1291.

APPENDIX "E"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1973 — APRIL SESSION, 1974

No. 73-1853

JOSE MOODY, *Petitioner-Appellant,*

vs.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

Appeal from the United States District Court for the Eastern District of Illinois. — No. CR-72-40-D
HENRY S. WISE, *Judge.*

ARGUED APRIL 19, 1974—DECIDED MAY 22, 1974

Before SWYGERT, *Chief Judge,* CASTLE, *Senior Circuit Judge,* and SPRECHER, *Circuit Judge.*

SPRECHER, *Circuit Judge.* Although the conviction involved here is affirmed, we are using this appeal to attempt to forestall unnecessary appeals and retrials in the future based upon alleged plea bargaining not shown of record.

I

Defendant Jose Moody was indicted for possession, with intent to distribute, of approximately 295 grams of heroin in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). On August 28, 1972, he appeared with retained counsel and pleaded not guilty. On September 13, he reappeared

with the same retained counsel and withdrew his not guilty plea and pleaded guilty. At that time the court addressed the defendant personally and attempted to determine whether the plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea. Rule 11, FED. R. CRIM P. Defendant was sentenced on October 10, 1972 to five years' imprisonment and, in addition, to a special parole term of three years.

On January 3, 1973, defendant submitted *pro se* his sworn petition for reduction of sentence in which he claimed that "petitioner's attorney . . . used his position to coerce the guilty plea by offering a ninety day jail sentence with five years probation to follow." The petition was denied on January 11, the court upon review of the record finding that the plea of guilty was entered freely and voluntarily by the defendant.

On February 8, 1973, defendant submitted *pro se* his signed but not sworn motion to withdraw his guilty plea and to vacate the illegal sentence in which he alleged that his retained counsel had told him "that he has made a deal with the U. S. Attorney through a plea bargaining action" whereby defendant "would receive not over a nine (9) month sentence of imprisonment and the remaining part of his sentence on probation." He further alleged that his counsel had instructed him as to the answers to be given to the sentencing judge and that "the judge was in on the deal." The motion was denied on March 26, 1973, the court upon another review of the record finding that defendant "knew and understood the charges against him, and the consequences of a plea of guilty," and that defendant "was represented by competent counsel . . . of his own choosing, and no dissatisfaction was expressed" by him "until approximately four months after judgment was entered."

In permitting defendant to proceed in forma pauperis in this court, Judge Stevens on September 7, 1973 raised the question: "Would it be appropriate to require the petitioner, in order to obtain an evidentiary hearing, to support his general allegations by either (a) affidavit of the lawyer who represented him at the arraignment, or (b) an affidavit of his own containing sufficient specific factual detail to indicate that there is probable merit to his claim."

The defendant appealed on the grounds that (1) the district court failed to address the defendant personally, (2) the record does not show that defendant voluntarily and understandingly entered the plea of guilty, and (3) the defendant was entitled to an evidentiary hearing upon his allegation that his guilty plea was induced by his retained attorney's promise of a lighter sentence.

II

Prior to accepting defendant's guilty plea on September 13, 1972, the district court addressed twenty-one questions to the defendant personally, covering the maximum possible penalty, the defendant's right to plead not guilty and right to a jury trial, whether the defendant desired to plead guilty and to waive a jury trial, whether he was coerced or given promises or threatened or intimidated, whether defendant was physically or mentally ill, addicted to narcotics or alcohol, and whether he knew the charges against him and was guilty of those charges. Defendant's challenge to the completeness of these Rule 11 inquiries went to the requirement that the judge satisfy himself that "there is a factual basis for the plea." *McCarthy* v. *United States,* 394 U.S. 459, 467 (1969).

On September 13, the court asked the defendant personally whether he knew the charge against him and whether he was guilty of that offense. Two weeks earlier when he had pleaded not guilty, the charge was stated in detail to him by the court and by the prosecutor. Prior to sentencing on October 10, when he still had an opportunity to withdraw his guilty plea, the court asked the following questions of the defendant relative to the factual basis for the plea:

THE COURT: You did have this heroin in your possession, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: How much did you have?

THE DEFENDANT: About twelve ounces.

THE COURT: What would twelve ounces of heroin be worth?

THE DEFENDANT: I don't know. The man was going to give me a thousand dollars for each one.

THE COURT: A thousand dollars an ounce?

THE DEFENDANT: Yes. That is what he say.

THE COURT: How long had you had this heroin?

THE DEFENDANT: Well, I had it about a month.

THE COURT: About a month.

THE DEFENDANT: He bring it to me and I put it on the farm.

THE COURT: Sir?

THE DEFENDANT: A friend of mine brought it to me so I can sell it and I keep it on the farm. I didn't want to sell it. I didn't know anybody so I had a friend of mine come to me and asked if I could find some so I said, "Yes, I know where I can find some." That is how it happened.

* * *

THE COURT: Where did you get this heroin?

THE DEFENDANT: A friend of mine brought it to me.

THE COURT: You kept it in your possession?
THE DEFENDANT: I put it on the farm. I put it in a can and dropped it in a hole there because I don't want to fool with it.

We conclude that the district court adequately addressed the defendant personally and determined that the plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea, as required by Rule 11 as it read at the time of the trial and as it now reads.

Defendant's final contention was that he was entitled to an evidentiary hearing regarding his allegation of plea bargaining.

The Supreme Court said in *McCarthy* that "Rule 11 is designed to eliminate any need to resort to later fact-finding proceeding 'in this highly subjective area.'" 394 U.S. at 469. At present, Rule 11 makes no requirement relating to the disclosure of alleged plea bargains (see Part III hereof).

In *Machibroda* v. *United States,* 368 U.S. 487 (1962), the prisoner filed a motion under 28 U.S.C. § 2255 to vacate his sentence, stating that in violation of Rule 11 the court had accepted the guilty plea without first determining its voluntariness when in fact plea bargaining had taken place. The opinion does not disclose what, if anything, the trial court had done in regard to a Rule 11 interrogation, but the defendant did file an extensive and highly detailed affidavit recounting the specifics of the promises made. The Court's opinion contains the complete affidavit and it is characterized as "detailed and specific." 368 U.S. at 495. The Court vacated the judgment denying a hearing in order that a hearing be held. However the Court said at 495-96:

> What has been said is not to imply that a movant must always be allowed to appear in a district court for a full hearing if the record does not conclusively and expressly belie his claim, no matter how vague, conclusory, or palpably incredible his allegations may be. The language of the statute does not strip the district courts of all discretion to exercise their common sense.
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> There will always be marginal cases, and this case is not far from the line. But the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible.

Machibroda's detailed affidavit was made several years after his conviction. In the present case a few months after his conviction, defendant made the bare-bones allegation that he was promised a ninety-day jail sentence and a month later he made the general allegation that he was promised a nine-month sentence of imprisonment. We do not believe that defendant triggered the need for an evidentiary hearing. *See Fontaine* v. *United States,* 411 U.S. 213 (1973), for another example of the detail required to be alleged in order to be entitled to a hearing.

We conclude therefore that the district court did not abuse its discretion in denying without hearing the defendant's motion to withdraw his guilty plea and to vacate his sentence.

III

In exercise of our supervisory power[1] and because of

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[1] Since we are not issuing a mandamus (Note, *Supervisory and Advisory Mandamus Under the All Writs Act,* 86 HARV. L. REV. 595 (1973)), our action is more closely akin to a "Sunburst." *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358 (1932); Schaefer, *The Control of 'Sunbursts': Techniques of Prospective Overruling,* 42 N. Y. U. L. REV. 631 (1967).

a substantial number of appeals raising the same issue of off-the-record plea bargaining, we are taking this opportunity to attempt to conserve judicial energy in this circuit. *See United States* v. *Silvern*, 484 F.2d 879 (7th Cir. 1973).

The negotiated plea of guilty or "plea bargaining" has been a traditional anomaly of the judicial system. Although a substantial number of guilty pleas, which in turn account for about 90 percent of all convictions, have been the product of negotiations between prosecutors and defense counsel, with occasional participation or knowledge on the part of the trial judge, the whole process had been largely invisible and carried on with the pretext that it did not exist.[2]

In 1967, the President's Commission on Law Enforcement and Administration of Justice recommended[3]:

> If a negotiated agreement to plead guilty is reached, care should be taken by prosecutor and defense counsel to state explicitly all its terms.

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[2] President's Commission on Law Enforcement and Administration of Justice, Task Force on Administration of Justice, Task Force Report: The Courts 9 (1967): "The system usually operates in an informal, invisible manner. There is ordinarily no formal recognition that the defendant has been offered an inducement to plead guilty. Although the participants and frequently the judge know that negotiation has taken place, the prosecutor and defendant must ordinarily go through a courtroom ritual in which they deny that the guilty plea is the result of any threat or promise." *See also*, Justice Erickson, *The Finality of a Plea of Guilty*, 48 Notre Dame Lawyer 836, 839-41 (1973).

[3] THE CHALLENGE OF CRIME IN A FREE SOCIETY 136 (1967).

> Upon the plea of guilty in open court the terms of the agreement should be fully stated on the record and, in serious or complicated cases, reduced to writing.

In 1968, the American Bar Association Standards for criminal justice relating to pleas of guilty were approved by the ABA House of Delegates and contained the following standard as part of Section 1.5[4]:

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[4] American Bar Association Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty 29 (1968).

Section 1.8 at 36-37 provides:

> Consideration of plea in final disposition.
>
> (a) It is proper for the court to grant charge and sentence concessions to defendants who enter a plea of guilty or nolo contendere when the interest of the public in the effective administration of criminal justice would thereby be served. Among the considerations which are appropriate in determining this question are:
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> (i) that the defendant by his plea has aided in ensuring the prompt and certain application of correctional measures to him;
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> (ii) that the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct;
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> (iii) that the concessions will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;
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> (iv) that the defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial;
>
> (v) that the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct;

The court should not accept a plea of guilty or nolo contendere without first determining that the

(footnote continued)

(vi) that the defendant by his plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders.

(b) The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the rehabilitative, protective, deterrent or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove his guilt at trial rather than to enter a plea of guilty or nolo contendere.

Section 3.3 at 71-72 provides:

Responsibilities of the trial judge.

(a) The trial judge should not participate in plea discussions.

(b) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that other charges before that court will be dismissed or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition if the information in the presentence report is consistent with the representations made to him. If the trial judge concurs but the final disposition does not include the charge or sentence concessions contemplated in the plea agreement, he shall state for the record what information in the presentence report contributed to his decision not to grant these concessions.

(c) When a plea of guilty or nolo contendere is tendered or received as a result of a prior plea agreement, the trial judge should give the agreement due consideration, but notwithstanding its existence he should reach an independent decision on whether to grant charge or sentence concessions under the principles set forth in section 1.8.

plea is voluntary. By inquiring of the prosecuting attorney and defense counsel, the court should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is, what agreement has been reached.

This standard was supplemented by additional standards approved in 1972 relating to the function of the trial judge, which provided in Section 4.1(b)[5]:

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[5] American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Function of the Trial Judge 51-52 (1972). The entire section 4.1 reads as follows:

Role of the judge in plea discussions and plea agreements.

(a) The trial judge should not be involved with plea discussions before the parties have reached an agreement other than to facilitate fulfillment of the obligation of the prosecutor and defense counsel to explore with each other the possibility of disposition without trial.

(b) The trial judge should not accept a plea of guilty or nolo contendere without first inquiring whether there is a plea agreement and, if there is one, requiring that it be disclosed on the record.

(c) If the plea agreement contemplates the granting of charge or sentence concessions by the trial judge, he should:

(i) unless he then and there grants such concessions, inform the defendant as to the role of the judge with respect to such agreements, as provided in the following subparagraphs;

(ii) give the agreement due consideration, but notwithstanding its existence reach an independent decision on whether to grant charge or sentence concessions; and

(iii) permit withdrawal of the plea (or, if it has not yet been accepted, withdrawal of the tender of the plea) in any case in which the judge determines not to grant the charge or sentence concessions contemplated by the agreement.

(d) The trial judge may decline to give consideration to a plea agreement until after completion of a presentence investigation or may, in accordance with ABA Standards, Pleas of Guilty § 3.3(b), indicate his conditional concurrence prior thereto.

> The trial judge should not accept a plea of guilty or nolo contendere without first inquiring whether there is a plea agreement and, if there is one, requiring that it be disclosed on the record.

Chief Justice Burger, speaking for a unanimous court on this point, said in *Santobello* v. *New York*, 404 U.S. 257, 260-61:

> . . . The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.
>
> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

On April 23, 1974, the Supreme Court approved and transmitted to Congress, to take effect on August 1, 1974 if approved, amendments to the Federal Rules of Criminal Procedure, including a greatly expanded Rule 11 which details plea agreement procedure.

Amended Rule 11 includes in paragraphs (e)(2),(e)(5) and (g) the following:

> (e)(2) *Notice of such agreement.*—If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or nolo contendere in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed, the court shall require the disclosure of the agreement in open court at the time the plea is offered.
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> (e)(5) *Time of plea agreement procedure.*—Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.
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> (g) *Record of Proceedings.*—A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

In order to forestall unnecessary appeals, district judges in this circuit should immediately expand their Rule 11 inquiry substantially as follows:

> I now inquire of the United States Attorney and of the prisoner and his counsel whether or not there have been plea negotiations. Before permitting you to respond, I advise you that the United States Supreme Court has specifically approved plea bargaining and has said it is "an essential component of the administration of justice . . . to be encouraged."

> You should advise me truthfully and fully of any plea negotiation without the slightest fear of incurring disapproval of the court.[6]

When and if amended Rule 11 takes effect, the language can be appropriately modified to indicate that the information sought is expressly required by Rule 11.[7]

The conviction of defendant Jose Moody is affirmed.

AFFIRMED.

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[6] *Compare Walters* v. *Harris*, 460 F.2d 988, 993 (4th Cir. 1972) *with Paradiso* v. *United States*, 482 F.2d 409, 413 (3d Cir. 1973) *and Bryan* v. *United States*, 492 F.2d 775, 781-782 (5th Cir. 1974).

[7] Due to the exercise of supervisory power in the opinion, we have circulated it among all judges in regular active service and no judge has requested that the case be reheard *en banc*. It should also be noted that we recognize that many district judges in this circuit already follow the suggested practice.